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Reply of the CRID Commission Staff working paper on the review of the EC legal framework in the field of copyright and related rights

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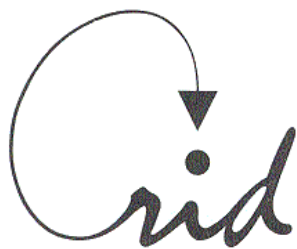
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Reply of the CRID

Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights

Introduction

The CRID is a research centre linked to the University of Namur (Belgium), specialised in computer and cyber law (more information at <http://www.crid.be>). It has carried out many researches in IPR and copyright, including many studies commissioned by the European Commission.

This paper has been written by the IPR department at CRID and particularly by Séverine Dusollier, Laura Vilches Armesto, Isabelle Vereecken and Fabrice de Patoul.

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The reply follows the structure of the Commission Working paper.

2. UPDATING THE CURRENT LEGISLATION

2.1. Horizontal issues

2.1.1. Reproduction right

No specific comment

2.1.2. Distribution right

No specific comment

2.1.3. Exceptions and limitations

The case for temporary acts of reproduction

The CRID completely agrees with the reasoning and recommendation stated in the Working Paper. The regime of the exception for temporary acts of reproduction in the Software Directive and in the Database Directive should be aligned on the provision of article 5(1) of the Information Society Directive.

The CRID would like to stress one point not mentioned in the Working Paper, i.e. the notion of the lawful user, condition of the exception for temporary act of reproduction and for some other exceptions of the *acquis communautaire*.

The notion of the lawful user

A clarification of the notion of the lawful user, regularly used in the *acquis communautaire*, would be useful. This notion appears in the Software Directive as a condition for the enjoyment of all exceptions (temporary copy, back up copy, study of the program, decompilation), and in the Database Directive as a condition for the specific exception to the copyright (acts necessary for the use and access to the database) and as a condition for the exceptions to the *sui generis* right (use of unsubstantial parts of the database, extraction for private purpose, teaching and research, public security).

Neither directives define the lawful user and the case law in Europe diverge.

Three different definitions of the lawful user are possible:

- 1) the lawful user is the user who has legally acquired a copy of the work;
- 2) the lawful user is the user who is authorised to use the work by virtue of a license contract concluded with the rightholder;

- 3) the lawful user is the user who uses the work in a way authorised by the rightholder or not restricted by law.

The Software Directive seems to refer to the first definition by using the terminology “lawful acquirer” while mentioning also either “a person having a right to use the computer program » (that can be understood as referring to definition (2) or (3)) or “a person having a right to use a copy of the computer program” (that can be understood as referring to definition (2)). The Database Directive uses the term “lawful user” without defining it. That notion has been construed by some scholars as comprising only the person who has entered into a license contract with the rightholder. The recital 34 of the Database Directive seems to back up such an interpretation by stating that “the lawful user must be able to access and use the database for the purposes and in the way *set out in the agreement with the rightholder*”.

The notion of the lawful user reappears twice in the Information Society Directive: on one hand, the temporary copy exception benefit to acts whose purpose is to enable a *lawful use* of the work or other subject matter; on the other hand, the solution of the article 6(4) to safeguard the exceptions against technological protection measures is only granted to a beneficiary of an exception having *legal access* to the protected work or subject matter concerned. The “lawful use” and “legal access” seem to be notions close to that of the lawful user. The recital 33 of the Information Society Directive defines the “lawful use as a use authorised by the rightholder or not restricted by law.

The reiteration of that notion of “lawful user” stresses that such a key concept in the system of exceptions in the *acquis communautaire* deserves to receive a common definition and interpretation. Each directive using the notion seems to have chosen a different definition thereof (definition (1) in the Software Directive; definition (2) in the Database Directive; definition (3) in the Information Society Directive). Moreover, the evaluation of the Software Directive points out that the notion should be interpreted in the same way in the Software and Database Directives, and refers to the definition (1), i.e. to the lawful acquisition of a copy of the work. Finally, case law and transposition of directives in the Member States diverge on that point, sometimes reducing the “lawful acquirer” of the Software Directive to the licensee (e.g. French and Belgian case law), or stating that the lawful user of a database is the one who uses the database under a license or under the permission of the law (e.g. Belgian law).

Such a divergence reduces the legal certainty and might have a negative impact on the functioning of the Internal Market. To stay in line with the general principles governing the exceptions to copyright and related right, the lawful user or lawful use/access should be defined as covering the use that is authorized by the rightholder or not restricted by law (definition (3)), as said in the Information Society Directive. The definition based on the lawful acquisition of a copy of the work (definition (1)) blurs the line between the intellectual property right and the tangible property right, contrary to the principle of the autonomy of the work and its support. As to the definition based on the license contract (definition (2)), it makes the rightholder competent to determine the benefit of the exception concerned, which contradicts the principle of the legal definition of copyright exceptions.

2.2. Vertical issues

2.2.1. Software Directive

2.2.1.1. Definition of computer program

No specific comment

2.2.1.2. Right of communication to the public

The CRID considers it necessary to explicitly provide for a right of communication to the public to computer programs. Case law has generally recognised such a right, even though the directive and national laws are mainly silent about it. But an explicit legal mention of the right of communication, including the right of making available to the public, would be useful in the digital environment where software can be made available on demand on line. Reference to article 4(c) of the Software Directive (“granting a right on any form of distribution) might be confusing and inadequate since the legal meaning of “distribution” in the *acquis communautaire* refers only to distribution of tangible copies of a work and not to online distribution of works.

2.2.1.3. Decompilation

The CRID considers that a study on the way the decompilation exception meets the needs of the market might be useful to assess the adequacy of the exception provided in the article 6 of the Software Directive. The possible extension of the interoperability purpose should namely be addressed. Indeed, the Software Directive only permits the decompilation carried out to achieve an interoperability between the decompiled software and another software. In the digital world, where there is a convergence between computer devices and electronic devices, between software and hardware, interoperability between a software and an hardware or equipment or between a software and a format or data can also be desirable. The article on decompilation of the Software Directive, as it stands now, does not meet this need.

2.2.1.4. Protection of technological measures

The CRID considers that, in a digital environment, the protection of technological measures (TM) should be identical whatever the type of work protected (literary and artistic, software, database). As said in the Working Paper, the Software Directive do not provide explicitly for a protection against the act of circumvention. There is another difference between the scope of the anti-circumvention provisions of the Software Directive and those of the Information Society Directive: only the circumvention devices whose sole purpose is to circumvent the TM protecting the software are prohibited while the criteria that define the illegality of the circumvention devices are more broadly defined by the article 6(2) of the Information

Society Directive. When applying the Software Directive, the national case laws have not encountered any difficulties and have considered the purpose of any element of a circumvention device. But, that might change with the application of the article 6 of the Information Society Directive. The same TM can protect different types of works, including a software and traditional artistic works. In order to prohibit the trafficking in devices enabling the circumvention of such a TM, courts will have difficulty in choosing the criteria that makes such devices unlawful. The matter would even be more difficult as far as a video game is concerned. Indeed, in some Member States, a video game is deemed to be both an audiovisual work and a software. If a TM protects a video game, the regime of legal protection of such TM against circumvention is therefore hybrid.

The Working Paper calls upon the tricky issue of decompilation to leave the separate anti-circumvention provisions as they are. Yet, solutions can be found to preserve decompilation, both by inserting the decompilation in the list of exceptions benefiting from a article 6(4)-type solution, and by stating that an act of circumvention aiming at exercising the exception of decompilation provided by the Software Directive, is not unlawful. Another solution will be to limit the scope of anti-circumvention provisions to the circumvention devices and not to prohibit the act of circumvention (as defended in a PhD written by S. Dusollier, researcher at CRID). Such a recommendation is however beyond the scope of this reply to the working paper.

The Working Paper does not say a word about the protection of rights management information (RMI), as provided in the article 7 of Information Society Directive. The protection of RMI does not cover the software, due to the safeguarding clause of the article 1 of the Information Society Directive. That induces that persons modifying or removing the RMI associated with a software or distributing software from which RMI has been removed or altered without authority, can not be pursued. Such an absence of protection of RMI related to computer programs is at odds with the article 12 of the WIPO Copyright Treaty that requires an adequate and effective protection of copyright management information of any work, computer programs being protected as literary works by article 4 of the WCT.

2.2.2. Rental right directive

No specific comment

2.2.3. Term Directive

2.2.3.1. Duration of related right

The reasoning laid down in the arguments of some rightholders for extending the duration of related rights is both confusing and inopportune.

First, caution should be taken when advocating regulating related rights by analogy with the US legal regime of copyright that do not know the notion of a related right in the musical sector. The 95-years term of protection for musical works applies to *copyright* in sound recordings and not to a *related right* in music productions. The confusion comes from the fact that such a term applies to sound recordings whose copyright holder is most often the producer of the music. Such a comparison is therefore ill-founded and too much far-reaching. It also confuses the logic of copyright and the logic of related rights.

Besides, the extension of the duration of copyright in the United States was based on the will to align the term of protection to that of the European Union. But, some specific provisions of the US copyright regime (e.g. works made for hire, sound recordings) required another way of calculating the duration than the death of the author. That explains the sometimes longer term for some subject matter. Extending the duration of related rights in Europe through the same reasoning, would certainly lead to a term of protection sometimes longer than the duration now provided by the US Copyright Act. Would then the same rightholders require a new extension of the term of protection in the United States first and eventually in the European Union? Such an outbidding tactics does not seem very reasonable and could result in an ongoing renewal of related rights protection.

It should also be reminded that the extension of the copyright term in the US has given rise to a strong opposition from the users and the public. The image of copyright has been greatly affected. The European Union should pay attention to all interests involved in the copyright and related rights regime by trying not to disrupt the balance embedded in the *acquis communautaire*. Unbalancing copyright and related rights by extending the duration of rights might ultimately prejudice such rights.

2.2.3.2. Criteria for calculating the term of protection in the musical sector

No specific comment

2.2.3.3. Critical and scientific publications

No specific comment

2.2.4. Database directive

2.2.4.1. Exception for the benefit of disabled

The CRID approves the position of the Working Paper on that point. The exception for the benefit of disabled should apply equally to the copyright and *sui generis* rights in database. Otherwise, the exception recognised for the other categories of works might be non effective where such works are integrated in a database.

2.2.4.2. Exception for the benefit of libraries

The same extension should be made in favour of the exception for the benefit of libraries for which databases have a significant importance. There is no risk that such an extension will reach too far, since the limits of the exception are strict (specific acts of reproduction, not for direct or indirect economic or commercial advantage, preservation purpose provided in some national laws, ...) and will be further controlled by the application of the three-step test.

2.2.4.3. Alignment of the exceptions

The teaching and research purpose exception in copyright and sui generis regimes is conceived differently. Indeed, in the second regime the notion of “lawful user” is applied. We consider that this notion should not be taken into account as regards to this exception because it plays as a supplementary criterion. The justification underlying the teaching and research exception fundament is the educative interest and the development of a knowledge society. This is the reason why we are in favour of applying both regimes equally to this exception.

It is not because the producer has invested time, money and effort to gather the contents of a database, that education and research must be sacrificed. The educative and scientific goals shall be given the same importance vis-à-vis both protections.

We wonder as well who the beneficiaries of this exception precisely are. Are all institutions which give courses covered or not by the scope of this exception? The same question is also worth to be asked in the case of the professor who gives classes to a student in her house. As regards to the research, it would be necessary as well to define the beneficiaries. For example, if some Member States have foreseen in their legislations of transposition of the Database directive different beneficiaries for this exception, which would be the applicable regime for a cross-border research project?

The European Commission should consider this question and try to give a definition or at least give the applicable criteria to assess the beneficiaries so that this exception is not the object of abuse.

3. ASSESSMENT OF ISSUES OUTSIDE THE CURRENT ACQUIS

3.1. Originality

No specific comment

3.2. Ownership

The concept of ownership covers various issues that are not all harmonized at a Community level. Some questions such as the ownership of employee’s creations, joint ownership or ownership of moral rights could lead to problematic situations.

Ownership of employee's creations

The ownership of the rights in a work made by an employee in the performance of her employment contract may vary according the Member State and the type of protection concerned.

In some European Union (EU) countries, the employer is the owner of the rights in works protected by the general copyright regime made by her employees in the performance of their duties. In other countries (mainly France, Italy, Belgium, Luxembourg and Portugal), the author remains the owner of the copyright, even if the work is created in the performance of an employment contract. This difference may cause some problems in cross-border situations where different rules on the ownership may apply. Indeed, the private international law rules regarding copyright may lead to the application of any of the laws of the different countries where the disputed work is exploited (pursuant to article 5.2. of the Berne Convention). This point is however debated since the scope of the law applicable to the employment contract (defined by article 6 of the Rome Convention) is uncertain: does it cover the question of the initial ownership of copyright ? A clarification of the scope of the contract law (Rome Convention) could benefit cultural industries by securing this key issue of the law applicable to copyright ownership. The opportunity to solve this problem is given by the revision of the Rome Convention process.

With respect to copyright protection, the Database Directive left the arrangements applicable to databases created by employees to the discretion of the Member States. Most of EU countries have provided that copyright on a database made by an employee is automatically transferred to her employer. In some Member States, the author of a database remains the ownership of the employee and not the employer (eg. France, Spain, Germany). In this context, the same practical difficulties subsist in a cross-border situation as described above.

Joint ownership

Joint ownership refers to a situation in which two or more persons share ownership of property rights. Joint ownership systems with regard to copyright are different between each Member State and, in particular, between continental legal systems and UK copyright law.

The rules related to the existence of ownership and the legal relationship between joint owners reflect different approaches. With regard to the creation of joint ownership situations, the continental law takes into consideration the level of the originality of the contribution while UK copyright law focuses more on skill and labour. The legal relationship between joint owners is largely the same in continental law systems : each joint owner can assign her own contribution but any dealing on the common work is subject to consent of each party. Under UK copyright law, a distinction is made according to whether the situation is of commercial nature or not. In absence of any joint ownership agreement, some problems could

arise especially when a work is created within a cross-country relationship (for instance in the framework of a research project funded by the European Community).

Specific issue : ownership of moral rights

An uncertainty regarding the ownership of moral rights can also be pointed out.

For instance, as already mentioned, the Database Directive left the arrangements applicable to databases created by employees to the discretion of the Member States. Most of European Union countries provide a transfer of ownership to the employer but differences may still subsist between those countries with respect to moral rights regime. On the one hand, some Member States implement an automatic transfer of rights which means that the initial ownership of the patrimonial rights is detained by the employee and then directly transferred to the employer. In this case, the moral rights still remain in the hands of the employee. On the other hand, some Member States consider that the employer has the initial ownership on the rights on the database (e.g. UK, the Netherlands). In other terms, the employer is deemed to own the moral rights. The same problem exists about software protection. Those differences are not obvious for a user who would like to deal with a single owner of the rights in a computer or a database

At a Community level, the rules on ownership should be taken into consideration in the forthcoming discussions on the *acquis*. The impact of these rules on the good functioning of the Internal Market should be analysed more in detail.

3.3. Definition of the term “public”

No specific comment

3.4. Points of attachment

No specific comment

3.5. Moral rights

No specific comment

3.6. Exhaustion of rights

No specific comment

CONCLUSION

The CRID considers that :

- the regime of the exception for temporary acts of reproduction of the Software and Database Directives should be aligned on the provision of article 5(1) of the Information Society Directive;
- the notion of the lawful user should be defined and harmonised in the concerned Directives;
- the right of communication, including the right of making available to the public, should be explicitly granted to software;
- the compliance of the decompilation exception with the needs of the market in the digital environment should be assessed;
- the protection of technological measures should be identical whatever the type of work protected (literary and artistic, software, database);
- the protection of rights management information, as provided in the article 7 of Information Society Directive, should equally apply to software;
- extending the duration of related rights is neither legitimate nor opportune;
- the exceptions for the benefit of disabled and for the benefit of libraries should also apply to the copyright and sui generis rights in database;
- the exception for teaching and research should be harmonised in the Database Directive and in the Information Society Directive and the criteria for determining the beneficiaries of that exception should be defined;
- the rules on ownership should be taken into consideration, particularly as far as employee's creations, joint ownership or ownership of moral rights are concerned.

CRID

October 2004